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OCA FILE Legislation

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OCA 86-1876
6 June 1986

MEMORANDUM FOR THE RECORD

SUBJECT: Senate Labor & Human Relations Committee
Hearing on S. 1815

1. On April 23, 1986, the Senate Labor & Human Relations Committee held a hearing on S. 1815, a bill to ban the private use of polygraphs. Committee Members present for most of the hearing were Senators Hatch, Kennedy (Chairman and Ranking Minority Member respectively and cosponsors of S. 1815), Nichols and Kerry.

2. There were approximately seven "panels" of witnesses. The first panel consisted of Representatives Pat Williams and Stewart McKinney, principal architects of H.R. 1524, the House companion.

3. The second panel consisted of Stephen Markman, Department of Justice, supported by several Justice officials. He testified in opposition to the bill on the grounds that it was contrary to the principles of federalism. He was asked several questions by the Members.

4. Senator Hatch claimed that, with reference to this bill and to a labor violence bill, Justice was taking inconsistent positions on federalism issues. Mr. Markman, however, dispelled the inconsistency.

5. Senator Kerry asked what should be done about situations where residents of a state banning polygraphs are polygraphed out-of-state. Mr. Markman responded that he thought such situations were anecdotal but that if the problem was shown to be substantial, Justice might change its position and support limited legislation dealing exclusively with that situation.

4. The remaining panels consisted of various individuals from the private sector: proponents, opponents, "victims", lawyers (including F. Lee Bailey) and others.

5. Justice has indicated to the Committee that it will recommend a veto should the measure pass. Justice wants to gauge the reaction to this and to the hearing. If the Committee still wishes to press forward, coordinated language exempting employees of government contractors could be supplied to the Committee.

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Department of Justice

INTERGOVERNMENTAL AFFAIRS
86-1477

File P04

STATEMENT

OF

STEPHEN J. MARKMAN
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

CONCERNING

S. 1815: THE POLYGRAPH PROTECTION ACT OF 1985

ON

APRIL 23, 1986

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Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear on behalf of the Department of Justice at this hearing on S. 1815, the proposed "Polygraph Protection Act of 1985." This bill, if enacted, would prohibit private sector employers from administering polygraph examinations to employees or prospective employees.

The Department of Justice vigorously opposes federalizing the law in this area. Such action is directly contrary to the principles of federalism on which our union is based and to which this Administration is deeply committed. Until now, regulating polygraph use has been the responsibility of the states. In fact, thirty-five states have enacted statutes regulating the use of polygraph or other "honesty" tests or polygraph examiners. To preempt the states in this context, where there is no evidence of an overriding need for national policy uniformity, would do violence to an important underlying principle of our union -- the belief in the ability and responsibility of the states generally to govern the affairs of their citizens.

The attempt to federalize the law in this arena has implications far beyond polygraph regulation; it is symptomatic of the persistent tendency of government officials in Washington -- well meaning officials -- to act as if only we can fully understand and remedy the problems confronting 240 million Americans. It is this attitude that, in recent decades, has been

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responsible for the mushrooming growth of a national government that has not only undertaken unmanageable responsibilities, but that also has usurped the decisionmaking authority of private citizens and of the levels of government closest to those citizens -- the states and their localities. It is an attitude that is responsible for a steady succession of constitutional debates within this country on Gramm-Rudman, on balanced budget and tax limitation constitutional amendments, on item veto initiatives, and on constitutional amending conventions.

This centralizing tendency is not difficult to understand. It is not surprising that public officials and other citizens, who believe that their public policy ideas are sound, want those ideas to be imposed uniformly upon the fifty states. It is not surprising that citizens who feel strongly about the merits of a public program want to bestow that program upon as many of their fellow-citizens as possible. And it is not surprising that a business or other private entity subject to some form of public regulation would prefer to abide by a single regulation promulgated by Washington than to have to abide by fifty separate regulations promulgated in Sacramento and Springfield and St. Paul. It is precisely because each of us can understand the impetus toward centralization of governmental authority that we have to be particularly careful to avoid falling victim to this tendency and, in the process, undermining the constitutional balances within our system of government.

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As with many things elemental, there is a tendency sometimes to give the principles of federalism short shift. I recognize that it is not always easy to identify a bright line between those responsibilities of government that ought to be carried out by the national government and those more appropriately addressed by the states. Even in this Administration, which is deeply committed to ensuring that each level of government operates in its appropriate sphere, we have sometimes had trouble drawing that line. It is important, nevertheless, that those in the executive and legislative branches not lose sight of the inherent responsibility to confront this matter.

This responsibility is particularly acute given the Supreme Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985). In that case, the Supreme Court held, with respect to federal regulation under the commerce power, that Congress, not the federal courts, generally is the primary protector of state sovereign rights and responsibilities. As the Court observed,

> We continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the commerce clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action.

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In other words, the principal burden of protecting the values of federalism in the commerce context lies with the Members of this body. As representatives, not only of the citizens of the states, but of the states themselves, it is the Congress that is principally vested with the responsibility to preserve the prerogatives of the states within the constitutional structure. Whatever the merits of the Court's decision in Garcia -- and this Administration opposes its holding and supported legislation prepared by this Committee to modify the Fair Labor Standards Act in response -- its observations on the role of the Congress in upholding federalism can hardly be disputed.

Because of their importance to this Committee's decision on whether to proceed with S. 1815, I would like at this time to briefly revisit the fundamental values of federalism. The healthy respect for the states envisioned by the Framers requires that the national government pay as much attention to who should be making decisions as to what decisions should be made and that, where appropriate, it defer to the states. It was the people of the states who created the national government by delegating to that government those limited and enumerated powers relating to matters beyond the competence of the individual states. All other sovereign powers, except for those expressly prohibited the states by the Constitution, are expressly reserved to the states or the people by the Tenth Amendment.

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The Framers of the Constitution set up a structure that apportions power between the national and state governments. The values that underlie this structure of federalism are not anachronistic; they are not the result of an historic accident; they are no less relevant to the United States in 1986 than they were to our Nation in 1789. In weighing whether a public function ought to be performed at the national or state level, we should consider the basic values that our federalist system seeks to ensure. Some of those principles include:

Dispersal of Power -- By apportioning and compartmentalizing power among the national and 50 state governments, the power of government generally is dispersed and thereby limited.

Accountability -- State governments, be being closer to the people, are better positioned as a general matter to act in a way that is responsive and accountable to the needs and desires of their citizens.

Participation -- Because state governments are closer to the people, there is the potential for citizens to be more directly involved in setting the direction of their affairs. This ability is likely to result in a stronger sense of community and civic virtue as the people themselves are more deeply involved in defining the role of their government.

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Diversity -- Ours is a large and disparate nation; the citizens of different states may well have different needs and concerns. Federalism permits a variegated system of government most responsive to this diverse array of sentiment. It does not require that public policies conform merely to a low common denominator; rather, it allows for the development of policies that more precisely respond to the felt needs of citizens within different geographical areas.

Competition -- Unlike the national government which is necessarily monopolistic in its assertion of public authority, the existence of the states introduces a sense of competition into the realm of public policy. If, ultimately, a citizen is unable to influence and affect the policies of his or her state, an available option always exists to move elsewhere. This option, however limited, enhances in a real way the responsiveness of state governments in a way unavailable to the national government.

Experimentation -- The states, by providing diverse responses to various issues which can be compared and contrasted, serve as laboratories of public policy experimentation. Such experimentation is ultimately likely to result in superior and in some instances naturally uniform policies, as states reassess their own and other states' experiences under particular regulatory approaches.

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Containment -- Experimenting with varying forms of regulation on a smaller, state scale rather than on a uniform, national scale confines the harmful effects of regulatory actions that prove more costly or detrimental than expected. Thus, while the successful exercises in state regulation are likely to be emulated by other states, the unsuccessful exercises can be avoided.

While these values of federalism may often mitigate in favor of state rather than national action, other factors -- including a demonstrated need for national policy uniformity or for a monolithic system of enforcement -- mitigate in favor of action by the national government and must be balanced in this process. For example, the need for a uniform foreign policy on the part of the United States clearly justifies national rather than state action in this area. Similarly, in the interstate commerce area, the need for a uniform competition policy argues strongly for national antitrust law; and the need for efficient flow of interstate transportation argues for national rather than state regulation of airplane and rail safety. In other words, by federalism, we are not referring to the idea of "state's rights"; rather, we are referring to the idea expressed in the Constitution that certain governmental functions are more properly carried out at the level of the fifty states, while others are more properly carried out by the national government.

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While reasonable individuals may well differ on the direction in which these and other factors of federalism point -- and that may well be the case in the context of S. 1815 -- it is nevertheless critical that we not lose sight of the need to go through this analytic process.

When these factors are examined in the context of polygraph regulation, the balance in the Administration's judgment is clearly struck in favor of state, not national, regulation. Not only is there no need for national enforcement or uniformity with respect to private sector polygraph use, but the benefits of leaving regulation to the states are evident; polygraph regulation is a complex issue, subject to extensive ongoing debate, in which a substantial number of reasonable responses are available to (and have indeed been adopted by) the states.

Whether or not polygraphs should be regulated by some level of government is not the issue here. Assuming that polygraphs are abused by private employers -- and there is no question that such abuse is possible -- the states are as capable as the national government of recognizing and remedying any such problem. In fact, they have the greater incentive to do so since the rights of their own citizens, to whom they are immediately accountable, are involved. As I indicated earlier, 70% of the states have already recognized a need for certain protections in this area and have provided them through various forms of state legislation.

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There are a number of interests that must be balanced in determining whether or how to regulate polygraphs. For example, while certain employees may be concerned about the intrusiveness of polygraph regulation, other employees -- for example, employees falsely accused of stealing from their employers -- may desire the availability of polygraph tests in order to establish their innocence.

Moreover, by protecting employees from the use of polygraph tests, employers are necessarily restricted in their use of a test that may help ensure they are hiring honest or firing dishonest employees. No one can dispute the need for identifying and discharging dishonest or thieving workers. From losses reported during a recent random sampling of three industries -- retail department store chains, general hospitals, and electronic manufacturing firms -- the National Institute of Justice estimated that business and industry lose to employee theft five to ten billion dollars annually. Not only are employers losing valuable assets and paying higher prices for theft insurance policies, but, to the extent possible, employers pass on those costs in the form of higher prices to consumers. Some of the commodities diverted -- drugs, for example -- impose their own costs on society. According to the Drug Enforcement Administration, legally produced drugs, falling in the wrong hands, kill and injure twice as many people annually as illicit drugs. DEA estimates that half a million to a million doses of drugs are

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stolen each year by employees of pharmacies and wholesale drug manufacturers and distributors.

Those opposed to the use of polygraphs will argue that the test is inaccurate and cannot provide employers with useful information. Certainly, the validity of polygraphs has been widely debated during the last two decades. The scientific community itself is divided. One camp, led by Prof. David C. Raskin of the University of Utah published, in 1978, a study assessing polygraphs to be 90 percent accurate, when properly conducted and evaluated. The opposing camp, led by Dr. D. T. Lykken of the University of Minnesota, claims that the test is much less accurate and that it works to screen out the most honest, most conscientious employees. As the dissenters in the House Committee on Education and Labor indicated in their report on the companion bill to S. 1815, "Field studies are difficult to validate, and 'laboratory' studies cannot exactly replicate polygraph usage. The Office of Technology Assessment (OTA) in a 1983 report concluded that 'no overall measure or single, simple judgment of polygraph testing validity can be established based on available scientific evidence.'" What is essential to recognize here is, not that one side or the other has satisfied the burden of persuasion, but that the current debate is an ongoing and vigorous one.

Apart from the debate in the scientific community, a number of employers obviously believe that polygraphs are useful devices

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for aiding them in making responsible decisions about existing or prospective employees. According to the House Committee Report on H.R. 1524, more than two million polygraph tests are administered in the private sector each year, triple the number given ten years ago. From an economic perspective, it seems highly unreasonable to believe that employers would incur the cost of $50-$60 per test and risk generating some bad will among valuable or potentially valuable employees, and perhaps losing them to competitors, if those employers did not believe the tests provided useful information. Moreover, it must be remembered that the alternatives to polygraph tests -- for example, background checks and personal interviews in the preemployment screening context -- may be far more highly subjective and may intrude upon privacy interests in at least as substantial a way. The value of polygraphs, therefore, should be analyzed not by some unattainable, ideal standard, but with reference to existing, real-world investigative alternatives. Again, these are considerations as to which different citizenries in different states may reasonably come to different conclusions.

S. 1815 itself takes an inconsistent stand on whether polygraph tests are sufficiently valid to be useful. While the bill would ban the use of polygraphs in the private sector, in large part because of the inaccuracies of the test, it explicitly recognizes the usefulness of polygraphs for the government by continuing to allow polygraph testing of all governmental employees. Certainly if the machines are reliable indicators

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of truth or falsity in the public sector they are equally as reliable in the private sector.

Apparently a majority of the Members of the House of Representatives also believes that polygraphs are useful in a variety of private sector contexts. When H.R. 1524 went to the floor on March 12, it contained a single exemption for companies involved in the storage, distribution, or sale of controlled substances. One representative after another offered amendments exempting various industries from the bill's blanket prohibition. The bill passed the House containing not only the original exemption, but also exemptions for workers in nursing homes and children's day care centers, security personnel, and public utility employees. From these exemptions it is clear that the very representatives who have voted to bar the use of polygraphs seem to recognize their usefulness and credibility in certain contexts.

More than that, however, these exemptions again highlight the arbitrary nature of decisions on which occupations to exempt. If polygraphs provide benefits to employers in the armored car industry, it is difficult, if not impossible, to understand why banks (where 84% of losses are attributed to employee theft) or the legal gaming industry (where large sums of money change hands and policing of employees is extremely difficult) are not entitled to the same benefits. Likewise, if polygraphs are useful to protect employers and the public from prospective employees

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seeking sensitive positions involving the distribution or sale of controlled substances, they would seem to be equally useful for screening prospective employees for other sensitive positions, such as airport security personnel and truck drivers transporting munitions and other hazardous materials.

What all of this indicates is that polygraph regulation is a complex and emotional issue which poses a number of questions with no definitive answers. It is an issue which requires careful balancing of the interests of consumers, employees, and employers. Possible responses range from relying on the free market, to licensing polygraph examiners, to banning completely the use of polygraphs. While all sorts of variations on these approaches are possible, which precise approach is best for any given state should be left to the citizens of that state. We see no reason to forestall the vigorous debate on the issue continuing to take place within the states.

In fact, those states that have regulated in this field have adopted widely varying approaches. Nineteen states and the District of Columbia regulate employers' use of the polygraph; three states regulate employers' use of other "honesty testing devices." Some of these states completely ban the use of polygraphs by private employers; others prohibit employers from requiring employees to take the tests, but allow them to be administered to employees who volunteer to take them; still others exempt certain occupations -- ranging from police and

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firefighters to jewelers to pharmaceutical companies -- from the ban. Six of these states additionally regulate polygraph examiners. Of those states that do not directly regulate employers' use of polygraphs, thirteen regulate polygraph examiners -- some requiring licensing, some limiting the types of questions that can be asked to employees. This diversity, with the alternatives it provides to citizens -- some of whom are vigorously opposed to polygraph use and some who are its adamant supporters -- and the ability to experiment with different approaches it allows, is one of the primary reasons the Framers of our Constitution created a two-tiered system of government, with much of the regulatory authority remaining with the states.

While the Department of Justice strongly opposes this bill in its entirety, or any other attempt to federalize this field, the bill is problematic by its own terms. For example, the current exemption for Department of Defense contractors -- included to protect sensitive national security interests -- is not adequate to protect all important national security matters. In addition to the Department of Defense, a number of other departments and agencies -- including the Central Intelligence Agency, the Departments of Energy, State and Treasury, the Federal Bureau of Investigation, and the National Security Agency -- would require exemptions pertaining to certain contractor employees.

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Again, however, I reiterate that merely fixing this or other more minor problems would not be sufficient to remedy the fundamental defect of this bill -- federalizing an area of law best left to the states.

I would like to conclude my remarks with a quote from President Reagan. In an address to the National Conference of State Legislatures on July 30, 1981, he stated:

> Today federalism is one check that is out of balance as the diversity of the states has given way to the uniformity of Washington. And our task is to restore the constitutional symmetry between the central government and the states and to reestablish the freedom and variety of federalism. In the process, we'll return the citizen to his rightful place in the scheme of our democracy and that place is close to his government. We must never forget it. It is not the federal government or the states who retain the power -- the people retain the power. And I hope that you'll join me in strengthening the fabric of federalism. If the federal government is more responsive to the states, the states will be more responsive to the people . . .

For the reasons so eloquently articulated by President Reagan, I urge that this bill not be enacted.

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